SCOMI GROUP BHD v. GELOMBANG GLOBAL SDN BHD & ANOR AND ANOTHER APPLICATION

HIGH COURT MALAYA, KUALA LUMPUR
ONG CHEE KWAN JC
[SUIT NO: WA-22NCC-74-02-2020 &
WA-22NCC-75-02-2020]
16 MARCH 2020

CIVIL PROCEDURE: *Injunction – Application for – Ex parte application for injunction to restrain disposal and transfer of pledged shares in any manner pursuant to stakeholder agreement – Company requested for lenders to provide financial assistance and undertook corporate restructuring exercise – Whether lenders entitled to exercise their respective rights against pledged shares in the event company defaulted in repayment of loan – Whether loan agreements illegal, invalid and unenforceable – Whether lenders in business of moneylending – Whether there were bona fide issues to be tried – Whether party came to court with clean hands – Whether application for injunctive reliefs made in good faith – Whether company suffered loss or hardship – Balance of convenience – Whether justice of case favoured dismissal of injunctive reliefs – Moneylenders Act 1951, s. 10OA*

Scomi Group Bhd ('Scomi') is a public listed company and the holding company of Scomi Energy Services Bhd ('SESB'), while both Gelombang Global Sdn Bhd ('GGSB') and Tan Sri Nik Awang ('TSWA') were existing shareholders of Scomi. Because of its urgent need of financial assistance to keep itself and its subsidiaries as going concerns, Scomi invited, *inter alia*, GGSB and TSWA to provide financial assistance to help address its short-term need for working capital. Scomi's arrangement was essentially to get ready fund from investors to keep itself afloat, so that it could gain more time to raise capital from the market by issuing new shares. Scomi announced that it would be undertaking a corporate restructuring exercise ('the proposals'). GGSB and TSWA were invited to advance the sum of RM21 million each to Scomi ('advance') and in respect of their respective advances, GGSB and TSWA entered into separate contracts with Scomi ('GGSB Undertaking, GGSB loan agreement and GGSB stakeholder agreement with GGSB and TSWA undertaking, TSWA loan agreement and TSWA stakeholder agreement with TSWA') Both GGSB and TSWA had undertaken to subscribe the shares in Scomi by way of the GGSB undertaking and TSWA undertaking. Scomi had, however, defaulted on its obligations to repay the advance with interest under both the GGSB loan agreement and TSWA loan agreement by the agreed date ('indebtedness repayment deadline'). Disputes arose between Scomi on the one hand and GGSB and TSWA on the other

as to whether the GGSB undertaking and TSWA undertaking were still in effect following Scomi's default in the repayment of the GGSB advance and TSWA advance under their respective GGSB loan agreement and TSWA loan agreement. On 19 December 2020, Scomi wrote to GGSB and TSWA separately, acknowledging its obligation to pay its indebtedness under the GGSB loan agreement and TSWA loan agreement respectively and sought their indulgence to extend the payment until 17 May 2020. On 10 January 2020, GGSB and TSWA informed Scomi that they were unable to accede to its request for extension and in their letters, GGSB and TSWA stated that their respective GGSB undertaking and TSWA undertaking would also lapse and cease to be of effect. On 20 January 2020, GGSB and TSWA wrote to Scomi to make immediate repayment of the indebtedness under their respective loan agreements and notified Scomi that they would exercise their rights in relation to their respective GGSB pledged shares and TSWA pledged shares if no payment was made within five days from the demand. Scomi then filed separate actions in the High Court against GGSB and TSWA seeking, *inter alia*, injunctions to restrain GGSB and TSWA from dealing with their respective pledged shares alleging that the loan agreements were invalid and unenforceable being in contravention of the Moneylenders Act 1951 ('the first suits'). On the same day, an application was filed for an *ex parte* injunction in both the suits. On 28 January 2020, Scomi discontinued the first suits with liberty to file afresh. Without any knowledge of the first suits, GGSB and TSWA, pursuant to discussions held with Scomi, agreed not to take further action in relation to their respective pledged shares and/or the undertakings pending resolution of their differences. However, Scomi's request to further extend the moratorium to 17 February 2020 was rejected and on the same day, Scomi wrote to Malayan Trustee Bhd ('MTB') stating that Scomi had been instructed and authorised by its board of directors to commence legal action against GGSB and MTB was instructed not to deal with the pledged shares pending final disposal of the legal action. On 11 February 2020, GGSB and TSWA gave notice to MTB on the event of default and instructed MTB to transfer their respective pledged shares pursuant to their respective stakeholder agreements. On 11 February 2020, Scomi made an announcement to Bursa Malaysia Securities Bhd ('Bursa') that it had failed to make good the amount demanded within the remedy period under the GGSB loan agreement and the TSWA loan agreement ('the announcement'). In the announcement, Scomi further acknowledged that both GGSB and TSWA shall each have a right to give notice in writing to the appointed trustee, MTB, to, *inter alia*, transfer or procure the transfer to GGSB or TSWA or their nominees such number of the GGSB pledged shares or the TSWA pledged shares that was equivalent in value to the outstanding loan amount. However, the announcement conspicuously failed to mention

that Scomi had filed the first suits and/or that Scomi had given instruction to its legal advisors to commence the legal action. On 12 February 2020, Scomi filed Suit 74 against GGSB and MTB, and Suit 75 against TSWA and MTB, and filed the *ex parte* applications (encl. 3 in both suits) seeking, *inter alia*, an injunction to restrain GGSB and TSWA from calling or notifying MTB to deal with or in any way to dispose of and/or transfer any of the fully paid up and unencumbered ordinary shares in the capital of Scomi ('the pledged shares') pursuant to the stakeholder agreements and an injunction to restrain MTB from disposing or procuring the disposal and/or transfer of procuring the transfer of the pledged shares in any manner pursuant to the stakeholder agreement. The issues that arose were (i) whether the GGSB loan agreement and the TSWA loan agreement were illegal, invalid and unenforceable under the Moneylenders Act 1951 and/or the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('AMLA'); and (ii) whether the GGSB undertaking and the TSWA undertaking had ceased to be in effect following the GGSB loan agreement and TSWA loan agreement having come to an end.

Held (dismissing encl. 3 in both Suit 74 and Suit 75):

(1) It was obvious from cl. 7 of the GGSB loan agreement and TSWA loan agreement, which states that 'the borrower acknowledges and admits that the lender is not in the business of moneylending nor does it usually carry on the business of moneylending', that the parties were fully aware of the presumption under s. 10OA of the Moneylenders Act 1951 when they agreed to the GGSB loan agreement and the TSWA loan agreement. There was no suggestion that Scomi had agreed to the said cl. 7 under any duress or coercion. The parties were represented by their respective legal advisors at all material times. The loan agreement together with the stakeholder agreement and letter of undertaking for both GGSB and TSWA were all negotiated at arm's length with Scomi. Scomi, GGSB and TSWA were all sophisticated commercial players and were no strangers to legal documents. By the aforesaid cl. 7, particularly the first sentence thereto, Scomi had expressly acknowledged and accepted that GGSB and TSWA were not in the business of moneylending and that GGSB and TSWA did not carry on the business of moneylending. Scomi was thus estopped from invoking the presumption under s. 10OA of the Moneylenders Act 1951 against GGSB and TSWA. Scomi had not adduced any evidence to show that GGSB and TSWA were moneylenders at all. On this ground alone, the submission based on the Moneylenders Act 1951, being devoid of any evidence, must be rejected. There was therefore no *bona fide* serious issue to be tried on this issue. (paras 52-55, 57 & 58)

(2) GGSB and TSWA, as existing shareholders of Scomi, had responded to Scomi's invitation to subscribe for the rights shares under the proposals and they had agreed to provide the advance under their respective loan agreements, but subject to the right to offset Scomi's indebtedness under the loan agreements towards their respective subscription consideration for the subscription of rights shares pursuant to the proposals. Under the agreed terms, it was only after the proposals could not materialise by the last day of the period of six months from the date of drawdown of the advance that GGSB and TSWA would become entitled to call an event of default to demand the full payment of the indebtedness under their respective loan agreements. Had the proposals materialised, the advance with interests would have been set-off against the consideration for the right shares. Hence, the object of the loan agreements was more to support Scomi's restructuring exercise. GGSB and TSWA, in entering into such loan transactions as existing shareholders of the company with the view to subscribe to the rights shares, could not be said to be a moneylender not could it be said that GGSB and TSWA, in entering into their respective loan agreements, were carrying on the business of moneylending. (paras 62-64)

(3) The proposals did not at all stipulate that GGSB and/or TSWA were not entitled to exercise their respective rights against the pledged shares in the event Scomi defaulted in repayment of their respective advance under the GGSB loan agreement and the TSWA loan agreement. The question whether the GGSB undertaking and TSWA undertaking continued to be of any effect or not was academic unless Scomi's proposals have been approved by Bursa. As at the time of the hearing of encls. 3 before this court, Bursa had yet to give approvals for Scomi's proposals. More pertinently, one of the injunctions that Scomi was seeking was to restrain GGSB and TSWA 'from implementing or carrying into effect in whatsoever manner the purported termination of the irrevocable undertaking.' At the time of the hearing of the applications, there was nothing that GGSB or TSWA could 'implement' or 'carry to effect' in relation to their respective undertakings. Both GGSB and TSWA were simply taking the legal position that they were no longer bound by their respective undertakings whereas Scomi was contending otherwise. In effect, the injunctive relief as prayed for by Scomi was really to compel GGSB and TSWA to specifically perform their respective undertakings when approvals were granted by Bursa for Scomi's proposals and the offers were made to GGSB and TSWA to subscribe for rights issue. In other words, Scomi was seeking a

mandatory injunction against GGSB and TSWA to perform their respective undertakings. Scomi, however, failed to demonstrate that it satisfied the test for a mandatory injunction to justify its application. (paras 76, 78-81 & 83)

(4) Scomi had invited GGSB and TSWA to subscribe for rights issue and further sought for and obtained from them advance to meet its urgent financial needs after agreeing to pledge its shares in SESB as security for the advance. Having utilised the advance and having publicly acknowledged defaulting on the repayment of the same and announcing that GGSB and TSWA had the right to transfer the pledged shares, Scomi then sought to renege on the same by the *ex parte* applications for injunctive reliefs based only on the presumption under the Moneylenders Act 1951 that GGSB and TSWA were carrying on the business of moneylending because interests were charged to their advance. This was notwithstanding Scomi's express admission in cl. 7 of the GGSB loan agreement and TSWA loan agreement stating otherwise. If at all the loan agreements were illegal, then Scomi ought not to be permitted to come to court to invalidate the loan agreements on the ground of illegality as it was a party in *pari delicto* with GGSB and TSWA. Clearly, Scomi had not come to court with clean hands and the applications for the injunctive reliefs were not made in good faith or were *bona fide*. (paras 85, 88 & 100)

(5) Scomi had not suffered any loss or hardship at all. Scomi had already received and utilised the advance under the GGSB loan agreement and TSWA loan agreement. Both GGSB and TSWA in seeking to transfer their respective pledged shares were merely seeking nothing more than exercising their respective securities to recover the monies owed to them. Scomi had not demonstrated and in fact wholly failed to address how the transfer of the pledged shares by GGSB and TSWA under the GGSB loan agreement and TSWA loan agreement and under their respective stakeholder agreements in exercise of their rights to recover their advance would affect its corporate exercise. The proposals did not at all stipulate that GGSB and TSWA were not entitled to exercise their respective rights against the pledged shares in the event Scomi defaulted in the repayment of the loan under the GGSB loan agreement and TSWA loan agreement. Thus, Scomi's loss, if any, could be adequately compensated by an award of damages which could be easily computed. There was also no suggestion that GGSB and TSWA were not financially capable of meeting Scomi's damages, if any. (paras 108, 110, 111 & 113)

(6) The balance of convenience favoured GGSB and TSWA because (i) GGSB and TSWA were already out-of-pocket to the sum of RM21 million each which was disbursed to Scomi pursuant to the GGSB loan agreement and the TSWA loan agreement; (ii) the transfer of the pledged shares was purely a recovery action to re-coup the sum that was disbursed to Scomi; (iii) Scomi had received the sum of RM21 million each from GGSB and TSWA. It had suffered no loss. On the other hand, if the pledged shares were not transferred as soon as possible, given Scomi's deteriorating financial health and SESB's current PN17 status, there was a real risk that GGSB and TSWA would not recover the full value of their advance as the value of the pledged shares would progressively deteriorate; and (iv) if the pledged shares were transferred to GGSB and TSWA, they would be able to participate in rescuing SESB for the benefit of all shareholders including Scomi. Accordingly, the justice of the case favoured the dismissal of the injunctive reliefs prayed for by Scomi. (paras 120 & 121)

Case(s) referred to:

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors [1995] 1 CLJ 461 SC ***(refd)***

Dato' Sri Andrew Kam Tai Yeow v. AmBank (M) Bhd [2019] 1 LNS 880 HC ***(refd)***

Dobell v. Cowichan Copper Co Ltd 65 DLR (2d) 440 ***(refd)***

Dr Mansur Hussain & Ors v. Barisan Tenaga Perancang (M) Sdn Bhd & Ors [2019] 1 LNS 661 CA ***(refd)***

Firstcrest Global Ltd & Ors v. Indexia Assets Ltd & Ors And Another Appeal [2006] 3 CLJ 860 CA ***(refd)***

Gibb & Co v. Malaysia Building Society Bhd [1982] 1 CLJ 185; [1982] CLJ (Rep) 99 FC ***(refd)***

Keet Gerald Francis Noel John v. Mohd Noor @ Harun Abdullah & Ors [1995] 1 CLJ 293 CA ***(refd)***

Pan Global Equities Sdn Bhd & Anor v. Taisho Company Sdn Bhd [2005] 3 CLJ 734 CA ***(refd)***

Pekeliling Triangle Sdn Bhd & Anor v. Chase Perdana Bhd [2003] 1 CLJ 153 CA ***(refd)***

Shepherd v. Sandham [1971] Ch 340 ***(refd)***

Tahan Steel Corporation Sdn Bhd v. Bank Islam Malaysia Bhd [2004] 6 CLJ 25 HC ***(refd)***

Tan Sri Abdul Khalid Ibrahim v. Bank Islam Malaysia Bhd & Another Case [2010] 4 CLJ 388 HC ***(refd)***

Legislation referred to:

Companies Act 2016, s. 116

Moneylenders Act 1951, ss. 5(1), 10OA, 15, 16(1)

Trust Companies Act 1949, s. 4

(Originating Summons No: WA-22NCC-74-02-2020)
For the plaintiff - Ben Chan & Alane Neo; M/s Lim Soh & Goonting
For the 1st defendant - Edward Kuruvilla, Tiew Kai Xiang (PDK) & Lim Ziyi (PDK); M/s Christopher & Lee Ong
For the 2nd defendant - FJ Cheah; M/s Shook Lin & Bok

(Originating Summons No: WA-22NCC-75-02-2020)
For the plaintiff - Ben Chan & Alane Neo; M/s Lim Soh & Goonting
For the 1st defendant - Yap Boon Hau, Adrian Koh & Phoebe Ng; M/s Mah-Kamariyah & Philip Koh
For the 2nd defendant - FJ Cheah; M/s Shook Lin & Bok

Reported by Suhainah Wahiduddin

JUDGMENT

Ong Chee Kwan JC:

Introduction

[1] There are two suits before the court.

[2] In Suit No: WA-22NCC-74-02-2020, Scomi Group Bhd ("Scomi") is the plaintiff, Gelombang Global Sdn Bhd ("GGSB") and Malayan Trustee Bhd ("MTB") are the first and second defendants respectively ("Suit 74").

[3] In Suit No. WA-22NCC-75-02-2020, Scomi is the plaintiff, Tan Sri Nik Awang @ Wan Azmi bin Wan Hamzah ("TSWA") and MTB are the first and second defendants respectively ("Suit 75").

[4] In both Suit 74 and Suit 75, Scomi filed an *ex parte* application (encl. 3 in both suits) seeking, *inter alia*, the following orders:

(i) an injunction be and is hereby granted to restrain the first defendant, whether by himself and/or his servant and/or agents or whosoever from calling or demanding for payment the sum of RM21,000,000 together with interest and/or default interest ("loan") or any thereof under the loan agreement in writing dated 17 July 2019 and supplemental letter to loan agreement dated 29 July 2019 ("loan agreement") and/or to call or on or notify the second defendant to deal with or in any way to dispose of and/or transfer any of the 435,233,161 fully paid up and unencumbered ordinary shares in the capital of Scomi Energy Services Bhd ("pledged shares") pursuant to the stakeholder agreement in writing dated 17 July 2019 ("stakeholder agreement");

(ii) an injunction be and is hereby granted to restrain the second defendant, whether by itself and/or its servants and/or agents or whosoever disposing or procuring the disposal and/or or transfer or procuring the transfer of the pledged shares in any manner pursuant to the stakeholder agreement;

(iii) further and/or in the alternative, if any of the pledged shares had been disposed of and/or transferred by the second defendant and/or that the second defendant had procured the disposal of or transfer of any of the pledged shares, an order that the second defendant be directed at its own costs and expense to return the amount of the pledged shares which had been disposed of and/or transferred or procured to dispose of or transfer to the plaintiff in the plaintiff's name within seven days from the date of this order;

(iv) an order restraining the first defendant, whether by himself and/or his servants and/or agents or whosoever from implementing or carrying into effect in whatsoever manner the purported termination of the irrevocable undertaking dated 16 July 2019 and supplemental letter to the undertaking dated 29 July 2019;

(v) costs of the application and costs relevant to the application be borne and paid by the first defendant to the plaintiff;

(vi) a date to hear the application *inter partes* be fixed within fourteen days from the date of this order; and

(vii) such further and/or other reliefs that this honourable court deems fit and proper in the circumstances of this case.

[5] The *ex parte* applications in both the Suit 74 and Suit 75 were directed on 13 February 2020 by this court to be heard *inter parte*. Pending the *inter parte* hearing, this court granted an *ad interim* injunction against MTB to restrain any disposal and or transfer of the pledged shares (which consisted of certain number of Scomi Energy Services Bhd ("SESB") shares) in MTB's possession and custody ("the first *ad interim* injunction").

[6] On 14 February 2020, pursuant to a further application by Scomi in Suit 74, this court granted a further *ad interim* injunction to restrain GGSB from disposing or transferring GGSB pledged shares (the SESB shares that had been transferred to GGSB) and to restrain GGSB from exercising any voting rights in respect of these transferred SESB shares ("second *ad interim* injunction").

[7] Both the first and second *ad interim* injunctions were ordered to run until the determination of the two encls. 3, namely, the two *inter parte* applications fixed for hearing on 20 February 2020.

[8] At the hearing on 20 February 2020, the court was informed that the GGSB pledged shares had in fact not been transferred to GGSB. Accordingly, the hearing of the two encls. 3 proceeded on the basis that the pledged shares had not been transferred by MTB.

Background Facts

[9] Scomi is a public listed company incorporated in Malaysia who has its shares and securities listed for quotation on the official list of the main market of Bursa Malaysia Securities Bhd ("Bursa"). Scomi is the holding company of SESB, another public listed company incorporated in Malaysia whose shares are similarly listed on the main market of Bursa.

[10] Both GGSB and TSWA are existing shareholders of Scomi.

[11] MTB is a Malaysian company registered as a trust company under s. 4 of the Trust Companies Act 1949.

[12] It is common ground that Scomi, at the time of the filing of Suit 74 and Suit 75, was in poor financial health. In fact, both Scomi and its subsidiary SESB are listed as PN17 companies due to their losses made in the past years.

[13] Because of its urgent need of financial assistance to keep itself and its subsidiaries as going concerns, Scomi invited, *inter alia*, GGSB and TSWA to provide financial assistance to help address its short-term need for working capital.

[14] Scomi's arrangement was essentially to get ready fund from investors to keep itself afloat, so that it can gain more time to raise capital from the market by issuing new shares.

[15] Scomi had announced that it would be undertaking a corporate restructuring exercise. This would involve:

(i) a proposed reduction of Scomi's issued capital pursuant to s. 116 of the Companies Act 2016 ("CA 2016") ("proposed share capital reduction");

(ii) a proposed consolidation of every four existing Scomi ordinary shares into one share ("consolidated shares") ("proposed share consolidation");

(iii) a proposed renounceable rights issue with warrants involving the issuance of up to 1,188,8980,151 new consolidated shares ("rights shares") together with up to 396,296,717 free detachable warrants ("warrants C") on the basis of three rights shares together with one free warrant C for every one consolidated share held by the entitled shareholders on an entitlement date to be determined later ("rights entitlement date") at an issue price of RM0.18 per rights shares ("issue price") ("proposed rights issue of shares with warrants"); and

(iv) a proposed settlement of liabilities owing by Scomi to Malayan Banking Bhd ("Maybank") and Astramina ("proposed liabilities settlement"). (the entire corporate exercise to be referred as "the proposals")

[16] GGSB and TSWA were invited to advance the sum of RM21 million each to Scomi ("advance"). In respect of their respective advance ("GGSB advance" and "TSWA advance"), GGSB and TSWA entered into the following separate contracts with Scomi:

For GGSB:

(i) an irrevocable undertaking dated 16 July 2019 between Scomi and GGSB ("GGSB undertaking");

(ii) a loan agreement dated 17 July 2019 between Scomi and GGSB ("GGSB loan agreement"); and

(iii) a stakeholder agreement dated 17 July 2019 between Scomi and GGSB and MTB ("GGSB stakeholder agreement").

For TSWA:

(i) an irrevocable undertaking dated 16 July 2019 between Scomi and TSWA ("TSWA undertaking");

(ii) a loan agreement dated 17 July 2019 between Scomi and TSWA ("TSWA loan agreement"); and

(iii) a stakeholder agreement dated 17 July 2019 between Scomi and TSWA and MTB ("TSWA stakeholder agreement").

[17] Under the GGSB loan agreement and TSWA loan agreement, the GGSB advance and TSWA advance thereto shall be repaid on interest bearing basis by Scomi by 17 January 2020 to GGSB and TSWA which was within six months from the date of drawdown on 18 July 2020.

[18] Scomi also granted GGSB and TSWA the option to set-off their respective advance, together with the interest accrued, against the payment for the shares in Scomi to be subscribed by GGSB and TSWA under the proposed rights issue of shares with warrants, pursuant to which the GGSB advance and TSWA advance can either be repaid or set-off/capitalised into new shares in Scomi.

[19] Pursuant to the GGSB loan agreement and the GGSB stakeholder agreement and the TSWA loan agreement and the TSWA stakeholder agreement, Scomi also pledged two separate tranches of 435,233,161 fully paid up and unencumbered ordinary shares in SESB to MTB, each tranche serving as security to the repayment of GGSB advance ("the GGSB pledged shares") and TSWA advance ("the TSWA pledged shares"), so that in the event Scomi were to default in the loan repayment under the GGSB loan agreement and the TSWA loan agreement, MTB is entitled to (i) dispose or procure the disposal (by sale or otherwise) and/or (ii) (if so instructed by GGSB or TSWA, as the case may be, at their absolute election) transfer or

procure the transfer to GGSB or TSWA, as the case may be, or their respective nominees of such number of GGSB pledged shares or the TSWA pledged shares, as the case may be, from the securities account that is equivalent in value to the outstanding loan.

[20] Both GGSB and TSWA were invited in as white knights to rescue Scomi from its difficulty. Both GGSB and TSWA had also undertaken to subscribe the shares in Scomi by way of the GGSB undertaking and TSWA undertaking.

[21] The GGSB undertaking and TSWA undertaking were stated as irrevocable subject to cl. 5 therein which provides that TSWA's and GGSB's undertaking shall expire upon the occurrence of the following events, whichever is later:

(i) 31 December 2019;

(ii) the closing date for the receipt of applications for and acceptance of the rights shares with warrant C under the proposed rights issue of shares with warrants; and

(iii) the closing date for the subscription of the restricted issue shares under the proposed restricted issue.

[22] There is no dispute that Scomi had defaulted on its obligations to repay the advance with interest under both the GGSB loan agreement and TSWA loan agreement by the agreed date ("indebtedness repayment deadline").

[23] Disputes have arisen between Scomi on the one hand and GGSB and TSWA on the other as to whether the GGSB undertaking and TSWA undertaking were still in effect following Scomi's default in the repayment of the GGSB advance and TSWA advance under their respective GGSB loan agreement and TSWA loan agreement.

[24] According to GGSB and TSWA, their respective undertakings were premised on the parties' intention that the proposed corporate restructuring exercise must be completed within a reasonable timeline – ie, by 31 December 2019. At all material times, it was the understanding and expectation of all parties that Scomi's proposed corporate restructuring exercise would be completed by 31 December 2019. Scomi had also publicly announced and represented to GGSB and TSWA that the said exercise will be completed by the second half of 2019.

[25] Under the GGSB loan agreement and TSWA loan agreement, the indebtedness repayment deadline for their respective GGSB advance and TSWA advance was stipulated as being six months after the date of full drawdown of the loan, being 17 January 2020. Such repayment date, which

A is 17 days after 31 December 2019, was stipulated as such so as to allow Scomi to have an additional period to raise the funding required to repay the advance in the event Scomi was unable to complete its proposed corporate restructuring exercise by 31 December 2019.

B **[26]** On 19 December 2020, Scomi wrote to GGSB and TSWA separately acknowledging its obligation to pay its indebtedness under the GGSB loan agreement and TSWA loan agreement respectively on 18 January 2020 and sought their indulgence to extend the payment until 17 May 2020.

C **[27]** On 10 January 2020, GGSB and TSWA informed Scomi that they were unable to accede to its request for extension. In their letters, GGSB and TSWA stated that their respective GGSB undertaking and TSWA undertaking would also lapse and cease to be of effect.

D **[28]** On 13 January 2020, Scomi wrote to GGSB and TSWA disputing that their respective undertakings would lapse and cease to have effect with the expiry of the indebtedness repayment deadline. Scomi also asked for re-consideration of its request for extension of the indebtedness repayment deadline and suggested a meeting to settle their differences.

E **[29]** On 20 January 2020, GGSB and TSWA wrote to Scomi to make immediate repayment of the indebtedness under their respective loan agreements and notified Scomi that they would exercise their rights in relation to their respective GGSB pledged shares and TSWA pledged shares if no payment was made within five days from the demand.

F **[30]** On 23 January 2020, Scomi filed separate actions in the High Court at Kuala Lumpur against GGSB and TSWA seeking, *inter alia*, an injunction to restrain GGSB and TSWA from dealing with their respective pledged shares alleging that the loan agreements are invalid and unenforceable being in contravention of the Moneylenders Act 1951 ("the first suits"). On the same day, an application was filed for an *ex parte* injunction in both the suits. No notice was given to GGSB or TSWA of the first suits and the *ex parte* G applications thereunder.

[31] No announcement was made by Scomi to Bursa on the commencement of the first suits and the *ex parte* applications. Neither were the cause papers to the first suits served on GGSB nor TSWA.

H **[32]** On 28 January 2020, Scomi discontinued the first suits with liberty to file afresh.

[33] Without any knowledge of the first suits, GGSB and TSWA, pursuant to discussions held with Scomi, agreed not to take further action in relation to their respective pledged shares and or the undertakings until 3 February I 2020 pending resolution of their differences. This was subsequently extended to 6 February 2020 and thereafter to 10 February 2020.

[34] However, Scomi's request on 10 February 2020 to further extend the moratorium to 17 February 2020 was rejected and on the same day, Scomi wrote to MTB stating that 'SGB has been instructed and authorised by its board of directors to commence legal action against GGSB ("legal action"). SGB is currently in the midst of filing the appropriate application in court for the purposes of the legal action. It is expected that the legal action together with a certificate of urgency will be filed in court within the next 48 hours'. MTB was instructed not to deal with the pledged shares pending the final disposal of the legal action.

[35] On 11 February 2020, GGSB and TSWA gave notice to MTB on the event of default and instructed MTB to transfer their respective pledged shares pursuant to cl. 4.1(a) of their respective stakeholder agreements.

[36] On 11 February 2020, Scomi made an announcement to Bursa that it has failed to make good the amount demanded within the remedy period under the GGSB loan agreement and the TSWA loan agreement ('the announcement').

[37] In the announcement, Scomi further acknowledged that both GGSB and TSWA shall each have a right to give notice in writing to the appointed trustee, MTB to:

(i) dispose or procure the disposal (by sale or otherwise); and/or

(ii) transfer or procure the transfer to GGSB or TSWA (as the case may be) or their nominees such number of the GGSB pledged shares or the TSWA pledged shares (as the case may be) that is equivalent in value (based on the five days VWAMP of the pledged shares as at the date of disposal or transfer) to the outstanding loan amount, to recover any amounts due, including any default interest for the period from the repayment deadline until full settlement of the GGSB advance and TSWA advance respectively.

[38] Scomi also notified Bursa in the announcement that both GGSB and TSWA have each given notice to MTB on 11 February 2020 to procure the transfer to GGSB and TSWA respectively such number of their respective pledged shares.

[39] However, the announcement conspicuously failed to mention that Scomi had sometime on 23 January 2020 filed the first suits and or that Scomi had given instruction to its legal advisors to commence the legal action.

[40] On 12 February 2020, Scomi filed Suit 74 and Suit 75 and filed the *ex parte* applications under the two encls. 3.

[41] After perusing the written submissions and hearing oral submissions by counsel for the parties, I dismissed with costs both the encls. 3 for Suit 74 and Suit 75 on 21 February 2020.

[42] I found that Scomi had failed to show that there are *bona fide* serious issues to be tried. I also found that the *ex parte* applications lacked *bona fide* or good faith. Further, damages are adequate remedy to Scomi in the event the injunctive reliefs are denied at this stage and Scomi's claims were to prevail at the trial of the suits. The balance of convenience is also not in favour of the granting of the applications. My full grounds are set out below.

No *Bona Fide* Serious Issues To Be Tried

[43] There are only two issues for consideration, namely:

(i) whether the GGSB loan agreement and the TSWA loan agreement are illegal, invalid and unenforceable under the Moneylenders Act 1951 and or the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ("AMLA"); and

(ii) whether the GGSB undertaking and the TSWA undertaking have ceased to be in effect following the GGSB loan agreement and TSWA loan agreement having come to an end.

[44] In relation to the Moneylenders Act 1951, Scomi contended that it has sufficiently established a serious issue to be tried based solely on the presumption under s. 10OA of the Moneylenders Act 1951 which provides:

> Where in any proceedings against any person, it is alleged that such person is a moneylender, the proof of a single loan at interest made by such person shall raise a presumption that such person is carrying on the business of moneylending, until the contrary is proved.

[45] Scomi's case based on the Moneylenders Act 1951 rests primarily on para. 52 of the affidavit affirmed by Sammy Tse Kwok Fai on 13 February 2020 which states:

> Further, the Plaintiff contends and will contend that the Loan Agreement was in fact a sham and illegal agreement in contravention of the Moneylenders Act 1951. I respectfully state that the 1st Defendant was not licenced under the Act to carry any moneylending transaction. As noted above, under the Loan Agreement, the 1st Defendant would be paid a high interest rate of 8% per annum on daily basis; additional default interest at 3%; payment term for the Loan was fixed and the Pledged Shares were pledged as security for the Loan. I am advised by the Plaintiff's solicitors and verily believe that it is a serious offence to carry out unlicensed moneylending transaction under the Moneylenders Act 1951 and Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001.

[46] There is no dispute that under the GGSB loan agreement and the TSWA loan agreement, GGSB and TSWA would be paid interest on their respective GGSB advance and TSWA advance. This is expressly provided under cls. 1 and 2 of the loan agreements which state:

> 1. Covenant to Pay
>
> The Borrower hereby covenants with the Lender that the Loan, including any interest thereon and all other charges whatsoever in connection therewith and/or incidental thereto ('indebtedness') shall be repaid in full by one bullet repayment no later than the last day of the period of six (6) months from the date of full drawdown of the Loan ('Indebtedness Repayment Deadline')
>
> 2. Interest and Costs
>
> 2.1 Interest on the Loan is at eight percent (8%) per annum, calculated on daily basis of a year of 360 days and for the actual number of days elapsed ('Interest Rate') and shall accrue throughout the Loan tenure.

[47] Accordingly, Scomi submitted that there is a presumption in this case based on s. 10OA of the Moneylenders Act 1951 that GGSB and TSWA are both carrying on the business of moneylending.

[48] Section 5(1) of the Moneylenders Act 1951 stipulates that no person shall carry on the business of moneylending unless he is licensed under the Act. There is no dispute that neither GGSB nor TSWA is a licensed moneylender under the Moneylenders Act 1951.

[49] Section 15 of the Moneylenders Act 1951 provides that no money lending agreement in respect of money lent after the coming into force of the Act by an unlicensed moneylender shall be enforceable.

[50] Accordingly, Scomi claimed that by reason of the aforesaid both the GGSB loan agreement and the TSWA loan agreement are unenforceable. They are also equally unenforceable under s. 16(1) of the Moneylenders Act 1951 as a copy of the duly stamped GGSB loan agreement and the TSWA loan agreement, being moneylending agreements, were not delivered to Scomi, as the borrower by GGSB and TSWA before the money was lent.

[51] With respect, I disagree.

[52] Scomi's aforesaid submission overlooked cl. 7 of the GGSB loan agreement and TSWA loan agreement which provides:

A 7. Fair and Equitable Terms

The Borrower acknowledges and admits that the Lender is not in the business of moneylending nor does it usually carry on the business of moneylending. The Lender is merely providing the Loan at the request of the Borrower, which may, at the election or discretion of the Lender, be repaid or set-off as referred to in Clause 4 hereinabove. The terms and conditions set out herein shall be based on terms and conditions which are no less favourable given by the Borrower to any of the identified investors for any advances or loans (if any) in relation to the Borrower's Proposed Rights Issue of Shares with Warrants and Proposed Restricted Issue. (emphasis added)

[53] It is obvious from the said cl. 7 that the parties were fully aware of the presumption under s. 10OA of the Moneylenders Act 1951 when they agreed to the GGSB loan agreement and the TSWA loan agreement.

[54] There is no suggestion that Scomi had agreed to the said cl. 7 under any duress or coercion. The parties were represented by their respective legal advisors at all material times. The loan agreement together with the stakeholder agreement and letter of undertaking for both GGSB and TSWA were all negotiated at arm's length with Scomi. It is also not disputed that Scomi, GGSB and TSWA are all sophisticated commercial players and were no strangers to legal documents.

[55] By the aforesaid cl. 7, particularly the first sentence thereto, Scomi had expressly acknowledged and accepted that GGSB and TSWA are not in the business of moneylending and that GGSB and TSWA do not carry on the business of moneylending. This is a fact which Scomi had admitted and agreed to, knowing full well the presumption under s. 10OA of the Moneylenders Act 1951.

[56] To my mind, Scomi's express acceptance of the fact stated in cl. 7 can only mean that Scomi had agreed and accepted that the presumption in s. 10OA of the Moneylenders Act 1951 has been proven to Scomi to the contrary.

[57] Further and/or alternatively, I hold that Scomi is estopped by cl. 7 of the loan agreements from asserting that GGSB and or TSWA are in the business of moneylending and or are carrying on the business of moneylending. This means that Scomi is estopped from invoking the presumption under s. 10OA of the Moneylenders Act 1951 against GGSB and TSWA.

[58] As a result, Scomi had not adduced any evidence before this court to show that GGSB and TSWA are moneylenders at all. On this ground alone, the submission based on the Moneylenders Act 1951, being devoid of any evidence, must be rejected. This means that on the available evidence before the court, there is no *bona fide* serious issue to be tried on this issue.

[59] In any case, it is my judgment that the facts presented before the court more than amply proved that GGSB and TSWA were not carrying on the business of moneylending or were moneylenders. In particular, the undisputed facts before the court are:

(i) both GGSB and TSWA were, prior to the entry into their respective loan agreement and stakeholder agreement, existing shareholders of Scomi;

(ii) various parties including GGSB and TSWA were invited by Scomi to subscribe to its rights issue of shares under the proposals;

(iii) as Scomi was in financial trouble and required immediate funds to sustain its operation, Scomi had proposed to various parties including GGSB and TSWA to enter into a loan agreement to advance cash to the company;

(iv) As a consideration, GGSB and TSWA were granted an irrevocable right of set-off which entitled them to offset the indebtedness under their respective loan agreements towards the payment of their respective subscription of the shares under the proposals;

(v) GGSB and TSWA were provided with the GGSB pledged shares and TSWA pledged shares as security for their advance under their respective loan agreements.

[60] The loan agreements, stakeholder agreements and the letters of undertaking were all prepared by Scomi's licensed financial advisors. This is not denied or disputed.

[61] Scomi had not adduced any evidence that GGSB and or TSWA had entered into loan agreements with any other parties.

[62] From the aforesaid facts, it is clear that GGSB and TSWA, as existing shareholders of Scomi, had responded to Scomi's invitation to subscribe for the rights shares under the proposals and they had agreed to provide the advance under their respective loan agreements but subject to the right to offset Scomi's indebtedness under the loan agreements towards their respective subscription consideration for the subscription of rights shares pursuant to the proposals.

[63] Under the agreed terms, it is only after the proposals could not materialise by the last day of the period of six months from the date of drawdown of the advance that GGSB and TSWA would become entitled to call an event of default to demand the full payment of the indebtedness under their respective loan agreements. Had the proposals materialised, the advance with interests would have been set-off against the consideration for the rights shares.

[64] Hence, from the nature of the aforesaid arrangement, the object of the loan agreements was more to support Scomi's restructuring exercise. GGSB and TSWA, in entering into such loan transactions as existing shareholders of the company with the view to subscribe to the rights shares cannot be said to be a moneylender nor can it be said that GGSB and TSWA in entering into their respective loan agreements were carrying on the business of moneylending.

[65] In *Pan Global Equities Sdn Bhd & Anor v. Taisho Company Sdn Bhd* [2005] 3 CLJ 734; [2006] 1 MLJ 158, Gopal Sri Ram JCA (as he then was) in dealing with a similar case as our present factual scenario said as follows at p. 738 (CLJ); pp. 161 to 162 (MLJ):

> The real issue before the learned judge was the true nature of the relationship between the respondent and the appellants at the material time. And that relationship was one of a shareholder and his company. It was in its capacity as shareholder that the respondent advanced monies to the appellants. There is therefore not a case of the respondent carrying on the business of money lending on the facts. It is commonplace in the corporate environment for shareholders or directors of a company to advance it funds at interest to tide it over difficult periods of financial hardship. Such transactions are necessary for keeping companies in a position to meet their debts as and when they fall due. If the courts proceed to treat these transactions as pure money lending within the Moneylenders Act 1951 ('the 1951 Act'), then no shareholder or director will ever be able to recover genuine advances *albeit* bearing interest made to his or her company during a time of want. Business in the corporate sector as we know it will come to a literal standstill and companies instead of looking to survival will face extinction.

[66] Accordingly, based on the evidence before the court, Scomi failed to show that there is a *bona fide* serious issue to be tried in respect of the Moneylenders Act 1951.

[67] Scomi contended that this court should not be making any determination at this interlocutory stage that GGSB and or TSWA were not carrying moneylending transaction and should only do so at the trial of the suits. It is contended that once Scomi has invoked the presumption under s. 10OA of the Moneylenders Act 1951, there is already established a *bona fide* serious issue to be tried without more.

[68] With respect, whilst I agree that at this interlocutory application stage for an injunction, all that the court needs to do is to see if there is a *bona fide* serious question to be tried, nevertheless, in considering the existence or otherwise of the same, this court must evaluate the facts placed before the court to determine if a *bona fide* serious issue to be tried has indeed been disclosed. This is in fact the first step to be taken by the court as stated in *Keet Gerald Francis Noel John v. Mohd Noor @ Harun Abdullah & Ors* [1995] 1 CLJ 293; [1995] 1 MLJ 193 at pp. 305 to 306 (CLJ); pp. 206 to 207 (MLJ) where Gopal Sri Ram JCA (as he then was) said thus:

> To summarise, a judge hearing an application for an interlocutory injunction should undertake an inquiry along the following lines:
>
> (1) He must ask himself whether the totality of the facts presented before him discloses a *bona fide* serious issue to be tried. He must, when considering this question, bear in mind that the pleadings and evidence are incomplete at that stage. Above all, he must refrain from making any determination on the merits of the claim or any defence to it. It is sufficient if he identifies with precision the issues raised on the joinder and decides whether these are serious enough to merit a trial. If he finds, upon a consideration of all the relevant material before him, including submission of counsel, that no serious question is disclosed, that is the end of the matter and the relief is refused. On the other hand if he does find that there are serious questions to be tried, he should move on to the next step of his inquiry;

[69] It is therefore not the case that just because Scomi had invoked the presumption under s. 10OA of Moneylenders Act 1951, the court must find that a *bona fide* serious issue to be tried has been established. Based on the aforesaid test, the court is bound to also look at the facts that are before it. In this case, based on the totality of the facts before this court as alluded to above, it is clear that Scomi had not shown at this interlocutory stage that there is a *bona fide* serious issue to be tried in respect of the issue under the Moneylenders Act 1951.

[70] On the issue under AMLA, Scomi had not made any submission at all on the relevant provisions thereunder, if any. Hence, I also hold that there is no *bona fide* serious issue to be tried under the provisions of AMLA.

[71] As regards the issue relating to the GGSB undertaking and the TSWA undertaking, Scomi took issue with TSWA's and GGSB's contention that their respective undertakings had ceased to have any effect with the expiry of six months from the date of the undertakings.

[72] In prayer 4 of encl. 3, Scomi prayed for:

> An order restraining the 1st Defendant, whether by himself and/or his servants and/or agents or whosoever from implementing or carrying into effect in whatsoever manner the purported termination of the Irrevocable Undertaking dated 16 July 2019 and Supplemental Letter of Undertaking dated 29 July 2019.

[73] According to Scomi, unless such an injunction is granted, Scomi's corporate exercise by way of the proposals would not be carried through.

[74] The proposed rights issue of shares with warrants was intended to be undertaken on the basis of a minimum subscription level of 419,938,341 rights shares together with 139,979,446 warrants C to raise gross proceeds of approximately RM75.6 million, after taking into consideration Scomi's minimum funding requirements ("minimum subscription level").

[75] It was to ensure that Scomi would be able to meet the minimum subscription level that several parties including GGSB and TSWA were sought by Scomi to provide an irrevocable undertaking that:

(i) GGSB and TSWA would subscribe for the rights shares together with warrants C under the proposed rights issue of shares with warrants which they would be entitled based on their respective rights entitlement date ("rights entitlement undertaking");

(ii) GGSB and TSWA would apply for excess rights shares ("excess rights shares") with warrants C not taken up by other entitled shareholders ("excess rights shares undertaking") provided the total value of GGSB's and TSWA's subscription under their respective rights entitlement undertaking and the excess rights shares undertaking would not exceed RM21 million in aggregate (the rights entitlement undertaking and the excess rights shares undertaking collectively referred as "subscription obligations"); and

(iii) GGSB and TSWA would each provide a payment of RM21 million as advance to Scomi as his commitment to perform, the subscription obligations ("advance undertaking").

[76] As can be seen above, the proposals do not at all stipulate that GGSB and/or TSWA are not entitled to exercise their respective rights against the pledged shares in the event Scomi defaults in the repayment of their respective advance under the GGSB loan agreement and TSWA loan agreement.

[77] The GGSB pledged shares and the TSWA pledged shares play no part at all in the proposals. The pledged shares are SESB shares owned by Scomi.

[78] The question whether GGSB undertaking and TSWA undertaking continued to be of any effect or not is academic unless Scomi's proposals have been approved by Bursa. As at the time of the hearing of encl. 3 before this court, Bursa has yet to give approvals for Scomi's proposals.

[79] More pertinently, the injunction that Scomi is seeking in prayer 4 above is to restrain GGSB and TSWA "from implementing or carrying into effect in whatsoever manner the purported termination of the irrevocable undertaking".

[80] At the time of the hearing of the applications, there is nothing that GGSB or TSWA could "implement" or "carry to effect" in relation to their respective undertakings. Both GGSB and TSWA are simply taking the legal position that they are no longer bound by their respective undertakings whereas Scomi is contending otherwise.

[81] In effect, the injunctive relief as prayed for by Scomi is really to compel GGSB and TSWA to specifically perform their respective undertakings when approvals are granted by Bursa for Scomi's proposals and the offers are made to GGSB and TSWA to subscribe for the rights issue. In other words, Scomi is seeking a mandatory injunction against GGSB and TSWA to perform their respective undertakings.

[82] It is trite that an interlocutory mandatory injunction will not be granted before trial save in exceptional and extremely rare case (see *Gibb & Co v. Malaysia Building Society Bhd* [1982] 1 CLJ 185; [1982] CLJ (Rep) 99; [1982] 1 MLJ 271). The case for Scomi must be unusually sharp and clear (see *Shepherd v. Sandham* [1971] Ch 340).

[83] Scomi had not demonstrated to the satisfaction of this court that it satisfied the test for a mandatory injunction to justify its application under prayer 4. This is quite apart from my holding that the said prayer is in fact academic at this stage.

[84] Based on the aforesaid reasons alone, Scomi's applications under the encls. 3 in both Suit 74 and Suit 75 are dismissed with costs.

Application Not *Bona Fide*

[85] In any case, this court also finds that Scomi had not come to court with clean hands and that the applications for the injunctive reliefs were not made in good faith or were *bona fide*.

[86] The GGSB loan agreement and TSWA loan agreement were entered into to enable fresh capital to be injected into Scomi immediately as Scomi was in dire financial needs. They were part of the restructuring exercise initiated by Scomi to keep it afloat.

[87] It was Scomi who had invited GGSB and TSWA to participate in its restructuring exercise, and it was Scomi's financial advisor who had prepared the loan agreement, letter of undertaking and stakeholder agreement. It is therefore unsurprising that throughout the entire period from July 2019 till 10 February 2020, Scomi had never once claimed that the loan agreements were invalid and unenforceable on the ground that the advance was an illegal moneylending transaction.

[88] Given how the loan agreements came to be and the fact that Scomi had received the advance thereunder, if at all the loan agreements were illegal being in contravention of the Moneylenders Act 1951 then Scomi ought not to be permitted to come to court to invalidate the loan agreements on the ground of illegality as it was a party in *pari delicto* with GGSB and TSWA.

[89] The principle that a party cannot be permitted to seek any assistance from the court if they are in *pari delicto* in partaking in an illegal transaction was made by Abang lskandar JCA (as he then was) in *Dr Mansur Hussain & Ors v. Barisan Tenaga Perancang (M) Sdn Bhd & Ors* [2019] 1 LNS 661 where His Lordship said:

> The learned HCJ had also considered the submissions by both learned counsel and ruled that even if the transaction was illegal, the Appellants could not seek any assistance from the court as they were in *pari delicto* in the partaking in the illegal transaction. The Appellants had come to court with unclean hands and were therefore not entitled to any benefits that may spring from the fountain of equity.

[90] In any case, surely Scomi cannot be permitted to blow hot and cold. On 11 February 2020, Scomi made the announcement acknowledging the debts to GGSB and TSWA. In the announcement, Scomi further acknowledged that both GGSB and TSWA shall each have a right to give notice in writing to the appointed trustee, MTB to exercise their rights under the stakeholder agreement.

[91] Scomi also notified Bursa that both GGSB and TSWA have each given notice to MTB on 11 February 2020 to procure the transfer to GGSB and TSWA respectively such number of their respective pledged shares.

[92] The announcement conspicuously failed to mention that Scomi had sometime on 23 January 2020 filed the first suits claiming, *inter alia*, that the TSWA loan agreement and GGSB loan agreement were invalid and unenforceable under the Moneylenders Act 1951.

[93] Neither did the announcement mentioned that Scomi would be challenging GGSB's and TSWA's right to give notice to MTB to transfer the pledged shares.

[94] Under Chapter 9, Part C of the Main Market Listing Requirements, Scomi is required to make immediate disclosure of 'the commencement of or the involvement in litigation and any material development arising from such litigation'.

[95] I agree with learned counsel for GGSB and TSWA that Scomi's conduct was disingenuous. To Bursa and the whole world, Scomi had publicly acknowledged the validity of the loan agreements, that it had defaulted on the payment thereunder and that GGSB and TSWA were entitled to enforce on the same and the pledged shares.

[96] Surreptitiously, however, Scomi had proceeded to file Suit 74 and Suit 75 and filed the encls. 3 to restrain GGSB and TSWA from enforcing on the loan agreements and the pledged shares on the ground that the advances were illegal moneylending transactions.

[97] Further, notwithstanding that notice was given to counsel for Scomi by counsel for GGSB and TSWA to notify them of any potential *ex parte* application to be filed in court, learned counsel for Scomi made no attempts to notify them of the same.

[98] Fortunately for GGSB, its solicitors got to know of the *ex parte* application and quickly rushed to court to attend the hearing although they were without any cause papers. Even at this stage, learned counsel for Scomi had insisted that because the application was *ex parte* in nature, learned counsel for GGSB had no *locus* to address the court, refusing even to extend a copy of the cause papers to him.

[99] It seems that Scomi was seeking to steal a march on GGSB and TSWA.

[100] There is no dispute that Scomi had invited GGSB and TSWA to subscribe for rights issue and further sought for and obtained from them advance to meet its urgent financial needs after agreeing to pledge its shares in SESB as security for the advance. Having utilised the advance and having publicly acknowledged defaulting on the repayment of the same and announcing that GGSB and TSWA had the right to transfer the pledged shares, Scomi then sought to renege on the same by the *ex parte* applications for injunctive reliefs based only on the presumption under the Moneylenders

Act 1951 that GGSB and TSWA were carrying on the business of moneylending because interests were charged to their advance. This was notwithstanding Scomi's express admission in cl. 7 of the GGSB loan agreement and TSWA loan agreement stating otherwise.

[101] In *Tan Sri Abdul Khalid Ibrahim v. Bank Islam Malaysia Bhd & Another Case* [2010] 4 CLJ 388; [2009] 6 MLJ 416, Rohana Yusuf J (as Her Ladyship then was) held as follows:

> Questioning of the validity of an agreement after benefiting from it upon default, in itself lacks *bona fide* as the plaintiff was in the position to obtain any Shariah or legal advice at the time he entered into the agreements with the bank. To turn around and challenge the validity of an agreement entered voluntarily after reaping the benefit under it appeared to be a mere afterthought.

[102] Clearly, Scomi had not come to court with clean hands. Since injunctions are a discretionary remedy, Scomi must come to this court with clean hands for he who comes to equity must come with clean hands. In *Tahan Steel Corporation Sdn Bhd v. Bank Islam Malaysia Bhd* [2004] 6 CLJ 25; [2004] 6 MLJ 1 at p. 63 (CLJ); p. 35 (MLJ), Abdul Malik Ishak J held that where the plaintiff had committed a breach of a contract, the court will not come to the aid of the plaintiff who seeks an injunctive relief in respect of the subject contract. In particular, at p. 63 (CLJ); p. 35 (MLJ), His Lordship stated thus:

> [103] ... In these circumstances, this court must certainly be slow to aid a party who, being in breach itself, attempts to obtain an injunction against a defendant who simply wishes to exercise its securities to recover the monies owed to it. ....
>
> [104] Here, there is more than an impending breach. Here, there is pre-existing breach on the part of the plaintiff and for that reason this court will not come to the aid of the plaintiff.

[103] Hence, even if there are *bona fide* serious issues to be tried, this court will refuse to grant the injunctive reliefs prayed for on the ground that Scomi lacks *bona fide* and did not come with clean hands.

Damages Are Adequate Remedy

[104] In *Pekeliling Triangle Sdn Bhd & Anor v. Chase Perdana Bhd* [2003] 1 CLJ 153; [2003] 1 MLJ 130, the Court of Appeal held that the relevant matters under the balance of convenience must be considered step by step. These steps were outlined by Mohd Noor Ahmad JCA as follows:

First, the learned judge must be satisfied that the plaintiff would suffer irreparable injury or that the plaintiff could not be adequately compensated in damages before proceeding to consider other relevant matters on the balance of convenience. This step is in consonance with what was said by Gopal Sri Ram JCA in *Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah & Ors* in para (2) cited above, couched in the phrase 'He must take into account all relevant matters, including practical realities of the case before him ...'. It must be so since *American Cyanamid v. Ethicon Ltd* is the *locus classicus* on the subject, and the learned judge in that case was not making new law but adopting the basic principles. The second step is if damages would not provide adequate remedy for the plaintiff in the event of it succeeding at the trial, the learned judge should then consider whether that if the defendants were to succeed at the trial in establishing their rights to do that which was sought to be restrained, they would be adequately compensated under the plaintiff's undertaking as to damages to the loss they would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason on this ground to refuse an interlocutory injunction. The third step is if there was doubt as to the adequacy of the respective remedies in damages available to either party or to both then only the judge should proceed to consider the question of balance of convenience. And the last step is where other factors appeared to be evenly balanced the question of the preservation of *status quo* would then come into play.

[105] Applying the aforesaid, can the plaintiff be adequately compensated by an award of damages for the loss it will suffer if GGSB and TSWA were to be permitted to transfer their respective pledged shares between the time of the application and the time of the trial?

[106] It must first be stated that the GGSB pledged shares and the TSWA pledged shares involved shares of a company listed in Bursa. The shares of SESB are freely traded in Bursa. This has been held by our Court of Appeal in *Firstcrest Global Ltd & Ors v. Indexia Assets Ltd & Ors And Another Appeal* [2006] 3 CLJ 860; [2006] 5 MLJ 723 to mean that for the purpose of assessing damages, it would be an easy exercise.

[107] Further, unlike in *Dobell v. Cowichan Copper Co Ltd* 65 DLR (2d) 440 (which was discussed in *Firstcrest Global Ltd & Ors* (*supra*), there is nothing to indicate that the pledged shares were required in any take-over battle in SESB at all.

[108] The fact is Scomi has not suffered any loss or hardship at all. Scomi had already received and utilised the advance under the GGSB loan agreement and TSWA loan agreement. Both GGSB and TSWA in seeking to transfer their respective pledged shares, are merely seeking nothing more than exercising their respective securities to recover the monies owed to them.

[109] Scomi's contention that with the transfer of the pledged shares, it would lose majority control of SESB is, with respect, a red herring. The thrust of Scomi's application for the injunctive reliefs is to ensure that its corporate exercise would go through and the risk of its shares being de-listed avoided.

[110] Scomi had not demonstrated and in fact wholly failed to address how the transfer of the pledged shares by GGSB and TSWA under the GGSB loan agreement and TSWA loan agreement and under their respective stakeholder agreements in exercise of their rights to recover their advance would affect its corporate exercise. The pledged shares are not part of Scomi's corporate exercise at all.

[111] As can be seen above, the proposals do not at all stipulate that GGSB and or TSWA are not entitled to exercise their respective rights against the pledged shares in the event Scomi defaults in the repayment of the loan under the GGSB loan agreement and TSWA loan agreement.

[112] The pledged shares play no part at all in the proposals. The pledged shares are SESB shares owned by Scomi. In fact, contrary to Scomi's contention, the indications from Scomi's creditors are that they would much prefer to deal with GGSB and TSWA as the substantial shareholders of SESB. Hence, the transfer of the SESB shares to GGSB and TSWA may in fact benefit SESB and Scomi.

[113] Accordingly, it is my judgment that Scomi's loss, if any, can be adequately compensated by an award of damages which are easily computed. There is also no suggestion that GGSB and TSWA are not financially capable of meeting Scomi's damages, if any.

[114] Having found that damages are adequate remedy, there is strictly speaking no need to consider the next steps and the balance of convenience.

[115] However, for completeness sake, I also hold that in the event GGSB and TSWA were to succeed at the trial of this action, they would not be adequately compensated by damages pursuant to Scomi's undertaking as to damages.

[116] In this regard, Scomi failed to adduce any evidence that it would be able to meet its undertaking as to damages if its application for injunctive reliefs are allowed and GGSB and TSWA are subsequently successful at the trial.

[117] On the contrary, there are ample evidence to suggest that Scomi's financial health had deteriorated since the entry into the GGSB loan agreement and TSWA loan agreement. More specifically:

(i) Scomi has been classified as a PN17 company by Bursa on 3 December 2019. This, despite having received the aggregated sums of RM42 million from GGSB and TSWA on or about 18 July 2019 under their respective loan agreements;

(ii) SESB has been classified as a PN17 company by Bursa on 21 January 2020; and

(iii) Scomi's external auditors, Messrs KPMG PLT had expressed material uncertainty related to the going concern of the company in the audited financial statements for the financial year ended 31 March 2018.

[118] In addition, there is a strong likelihood that the value of the pledged shares would drop significantly if GGSB and TSWA are not allowed to enforce on the same to recover their advance. This is due to GGSB's poor financial health and management of SESB as demonstrated by its PN17 status.

[119] Finally, even the balance of convenience is in favour of the court not granting the injunction prayed for by Scomi. Applying *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors* [1995] 1 CLJ 461; [1995] 1 MLJ 241, the High Court in *Dato' Sri Andrew Kam Tai Yeow v. AmBank (M) Bhd* [2019] 1 LNS 880 held that when a court considers the balance of convenience issue, it ought to have regard to the rights and interests of all parties, not only the applicant:

> This Court in determining the issue of balance of convenience must consider the issue based on the principle that it must take the course that appears to carry the lower risk of injustice ... From an analysis of the facts of this case, this Court is of the firm view that the balance lies with the Defendant as it is the party that faces the greater risk of injustice.

[120] I find that the balance of convenience favours GGSB and TSWA because:

(i) GGSB and TSWA are already out-of-pocket to the sum of RM21 million each which was disbursed to Scomi pursuant to the GGSB loan agreement and the TSWA loan agreement;

(ii) the transfer of the pledged shares is purely a recovery action to re-coup the sum that was disbursed to Scomi;

(iii) Scomi had received the sum of RM21 million each from GGSB and TSWA. It had suffered no loss. On the other hand, if the pledged shares are not transferred as soon as possible, given Scomi's deteriorating financial health and SESB's current PN17 status, there is a real risk that GGSB and TSWA will not recover the full value of their advance as the value of the pledged shares will progressively deteriorate; and

(iv) if the pledged shares are transferred to GGSB and TSWA, they would be able to participate in rescuing SESB for the benefit of all shareholders including Scomi.

[121] Accordingly, I hold that the balance of convenience and the justice of the case favour the dismissal of the injunctive reliefs prayed for by Scomi.

Conclusion

[122] For the reasons stated, the encls. 3 in both Suit 74 and Suit 75 are dismissed with costs fixed at RM50,000 after taking into account the urgency of the applications and the submission on the two *ad interim* injunctions made earlier.

Postscript

[123] When Suit 74 was first brought before this court on 12 February 2020, what was fixed for hearing was Scomi's *ex parte* application under encl. 3. Being an *ex parte* application, there was on record no indication as to the legal firm who would be acting for the defendants in the suit.

[124] However, counsel for GGSB received wind of the *ex parte* application and turned up to oppose the *ex parte* application. By this time, the court was appraised of the fact that counsel for GGSB was from Messrs Christopher & Lee Ong which was the firm that I had practised before my appointment as Judicial Commissioner.

[125] Upon discovering the aforesaid, I was informed that counsel for GGSB had suggested that Suit 74 together with encl. 3 thereto be heard before Justice Tn Anand Ponnudurai JC given that Suit 75 was fixed before His Lordship.

[126] However, after some discussions with counsel for Scomi, I was informed that counsel for all parties had decided for both the Suit 74 and Suit 75 to be heard before me.

[127] Pursuant thereto, counsel for the parties attended before Justice Tn Anand Ponnudurai JC and by consent agreed for Suit 75 to be transferred to this court to be heard together with Suit 74.

[128] When both the Suit 74 and Suit 75 came up before me following the said transfer, as a matter of record, counsel for GGSB again informed this court and all parties that he was from Messrs Christopher & Lee Ong, representing GGSB and that I was previously a partner in his firm. Learned counsel for Scomi stood up immediate to confirm that he had no objection at all to me hearing both the Suit 74 and Suit 75.

[129] Based on the aforesaid, I proceeded to hear oral submissions from counsel, made the *ad interim* injunction orders, and on 20 February 2020 heard full oral submission from counsel for both encls. 3 in Suit 74 and Suit 75 until 5.30pm. I then reserved my decision to the next morning, on 21 February 2020 at 9am.

[130] On 21 February 2020, just before I proceeded to deliver my decision, learned counsel for Scomi informed me that his clients had instructed him to bring to my attention that Messrs Christopher & Lee Ong was involved in rendering advice to GGSB on the loan agreement, stakeholder agreement and letter of undertaking.

[131] Learned counsel for Scomi confirmed that the advice was rendered by Messrs Christopher & Lee Ong after I had left the firm. He further confirmed that when he indicated to this court on 12 February 2020 that he had no objection to me hearing the Suit 74 and Suit 75, he was fully aware that Messrs Christopher & Lee Ong was representing GGSB. However, learned counsel for Scomi said that when he indicated that he had no objection to me hearing the suits, he did not know then that Messrs Christopher & Lee Ong was also involved in advising GGSB on the documents.

[132] Notwithstanding the aforesaid, I proceeded to deliver my decision as stated above. In my mind, having informed the court that the plaintiff had no objection to me hearing the applications, it was too late in the day to now seek to retract or raise doubt on the agreement after parties had completed their full submissions before me and all that was left was for me to deliver my decision. I cannot help but suspect that the real reason for the *volte face* was because the plaintiff had anticipated that the court may not be inclined to grant their applications after hearing the submissions from counsel. In any case, learned counsel for the plaintiff confirmed that there was no application to recuse me from proceeding with my decision. Further, I failed to see how the fact that Messrs Christopher & Lee Ong had also advised GGSB on the documents would make any difference to the plaintiff not objecting to me hearing the Suit 74 and the applications herein at the outset.